The purpose of retransmission consent is to permit the parties to negotiate all of the terms of carriage, such as channel positioning, etc. The parties should be free to negotiate the manner and conditions of carriage, including the applicability of FCC rules pertaining the manner and conditions of carriage under Part 76 of the Commission's rules. Application of rules such as those governing network nonduplication protection would frustrate Congress' intent that retransmission negotiations take place in a truly competitive environment. The Commission recognizes the inconsistency between the Act and existing rules as is evident from its request for comment as to "[w]hat changes are needed to avoid local broadcast station signals simultaneously being subject to mandatory carriage under the new statutory provisions and subject to deletion, in part, under the Commission's network nonduplication and syndicated exclusivity rules". NPRM at ¶ 23. TEL-COM proposes that only stations carried pursuant to must-carry should have full rights under Part 76 of the Commission's rules, including rights relative to channel positioning, network nonduplication, syndicated exclusivity, and carriage of the signal in its entirety.

6. Definition of Network

The Act provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable

system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. As discussed above, with regard to NCE stations, TEL-COM proposes that a station should be deemed to "substantially duplicate" the programming of another station if more than 14 hours of the weekly prime time programming (i.e., 6 p.m. to 11 p.m.) consists of programming aired on the other station. This definition should apply to commercial stations as well as NCE stations.

TEL-COM proposes that the definition of the term "network" for purposes of applying the must-carry provisions in situations where the programming schedules of two or more stations are similar should incorporate this substantial duplication concept. It will be inherently easier to implement one definition in the context of NCE, commercial, and duplicative network programming. The Commission has proposed several definitions which do not appear to differ with regard to the underlying policy rationale. The purpose of the Act is offer the greatest variety of programming to subscribers. TEL-COM asserts that its proposed definition, applied equally to NCE, commercial, and duplicative network programming, is consistent with the purpose of the Act.

7. Low Power Television Stations

The Act requires cable operators to carry the signals of qualified LPTV stations under certain circumstances. LPTV stations must meet very specific statutory criteria in order to

qualify for must-carry status. The Act requires that the Commission make a determination as to whether an LPTV station is so qualified. TEL-COM asserts that the LPTV station alone carries the burden of proving its qualifications. TEL-COM proposes that the Commission clarify that a cable operator is not required to carry an LPTV signal unless and until the Commission issues a final determination that the LPTV station is qualified. Additionally, because Congress has provided very specific and strict qualifying criteria for the mandatory carriage of LPTV stations, any waiver policy adopted by the Commission with regard to application of this rule must follow strict guidelines.

C. Generally Applicable Must-Carry Obligations

1. Channel Positioning

The Act requires that the signals of local commercial television stations carried pursuant to the must-carry rules be carried on the cable system channel number on which the station (1) is broadcast over the air, (2) was carried on July 19, 1985, or (3) was carried on January 1, 1992, at the station's election, or on such other channel number as is mutually agreed upon by the station and the cable operator. Similarly, the Act requires that NCE signals carried pursuant to must-carry protection appear on the cable channel number on which the qualified local NCE station (1) is broadcast over the air, or (2) was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator.

The Commission recognizes that more than one station may have a valid claim to the same cable channel number. NPRM at ¶ 33. The Commission also recognizes the potential inherent conflict between these channel carriage provisions and the requirement that operators establish a "basic service tier" containing, at a minimum, all of the signals of stations entitled to mandatory carriage. Id. TEL-COM supports the Commission's position that stations are entitled to their over-the-air channel position "only when that channel is encompassed by the basic service tier on the system". Id. Further, TEL-COM asserts that a station's right to any particular cable channel number must be limited to those channels which the operator allocates to the basic tier, regardless of whether that station's right is based on its carriage on July 19, 1985 or January 1, 1992, or on its over-the-air "on channel" rights. It is technically infeasible, as well as disruptive and confusing for subscribers, for the cable operator to scatter basic tier channels all over the cable channel spectrum. Finally, the cable operator should make the final determination with respect to channel assignments on the basic tier where more than one station is electing carriage on a particular channel. This is the most effective manner in which to resolve channel positioning disputes and will save valuable Commission resources.

2. Broadcast Signal Quality

The Act provides that a cable operator is not required to carry a local commercial television station that does not deliver to the principal headend of a cable system "either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment" unless the station agrees to bear the costs of delivering a good quality signal or a base band video signal. NPRM at ¶ 36. Consistent with this requirement that the broadcast station bear whatever expenses are associated with delivering such a signal, TEL-COM proposes that, as a prerequisite to carriage, the station requesting carriage must arrange and pay for any tests that may be required to determine whether the station's signal complies with the signal strength requirements of the Act. Furthermore, because the broadcast signal is generally picked up off-the-air at the principal headend, carriage should be based on the signal level measurements at the principal headend designated by the cable operator using a standard test antenna. A television station's efforts to utilize extraordinary means such as microwave to deliver a signal to the headend cannot be considered as a method to establish the must-carry status of a signal.

3. Compensation for Mandatory Carriage

The Act provides that a cable operator is not required to carry a local station that is otherwise eligible for must-carry status that would be considered a distant signal for copyright purposes absent indemnification for any increased

copyright costs resulting from its carriage as a distant signal. In order to determine the amount of copyright payments owed, cable operators must calculate the distant signal equivalent ("DSE"), which is the numerical value given to each distant television station. A cable operator must pay .893 percent of its gross receipts for the first DSE; .563 percent of its gross receipts each for the second, third, and fourth DSEs; and .265 percent of its gross receipts each for the fifth and additional DSEs.[14] TEL-COM proposes that the cable operator should be permitted to designate the priority of DSEs for copyright purposes and notify the stations accordingly of the operator's copyright liability.

4. Procedural Requirements and Remedies

The Act requires a cable operator to provide written notice to a local commercial television station or qualified NCE station at least 30 days prior to either deleting or repositioning that station. The operator is also required to give notice of the deletion or repositioning of an NCE station to its subscribers at least 30 days in advance. This 30 day notice requirement is consistent with many franchise requirements which also require 30 days' prior notice to the station and to the subscribers with regard to the deletion or repositioning of a station. Accordingly, TEL-COM believes that this requirement is reasonable.

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[14] Each independent broadcast station equals a full DSE, while each network and educational station equals 1/4 DSE each.

The Act requires that a station notify the cable operator, in writing, of any alleged failure to meet the operator's must-carry obligations. The cable operator must then respond to such notification within 30 days. If the dispute is not resolved, the commercial station may file a complaint with the FCC. If a local NCE station believes that a cable station has failed to fulfill its must-carry obligations, that station may immediately file a complaint with the Commission without notifying the operator. The Commission has requested comment on the implementation of these requirements. TEL-COM proposes that if the complaint of a commercial or NCE station involves the deletion or repositioning of that station, the station should be required to file its complaint within the 30-day notice period provided by the cable operator of the intended deletion or repositioning. The purpose behind the requirement that an operator provide 30 days' notice before deleting or repositioning a station is to provide that station with time to object to the deletion or repositioning. It is clearly not in the public interest for complaints to be filed after a proposed change goes into effect. Accordingly, TEL-COM proposes that a station must file any complaint regarding a proposed deletion or repositioning within the 30-day notice period or lose it right to file a complaint.

With regard to complaints submitted by NCE stations directly to the Commission, the Commission has proposed that all such complaints be served on cable operators who would then be

afforded ten days to respond in writing. Although TEL-COM agrees that cable operators must be afforded the opportunity to respond to such complaints, ten days is an insufficient amount of time within which to require an operator to respond. The Act provides a 30 day response time to complaints by commercial stations and is silent with regard to any time period for an operator's response to a complaint by an NCE station. Congress apparently determined that 30 days is a reasonable response time in the context of commercial complaints and the same response time should apply to complaints by NCE stations as well. At a minimum, the Federal Rules of Civil Procedure provide a 20 day period within which to respond to a civil complaint. Accordingly, TEL-COM proposes that the Commission adopt a 20 or 30 day period within which a cable operator may respond to a complaint by an NCE station. Both commercial and NCE stations should have ten days to reply to the cable operator's response to the complaint. The cable operator should then have ten days to answer to the reply.

The Act provides that within 120 days after the date on which a complaint is filed with the Commission, the Commission shall determine whether the cable operator has met its must-carry obligations. If the Commission finds that a cable system has wrongfully refused carriage of a station, the Commission may require the cable operator to begin carrying that station. TEL-COM proposes that in a situation where the Commission orders that a station be added to a cable system, the operator should

have at least 90 days to implement such an order so that the cable operator will have sufficient time to notify other stations being carried on the system that they must be deleted or repositioned to accommodate the Commission's order. An operator is required to provide 30 days' notice to a station of any deletion or repositioning. Sufficient time must be provided for the possibility that the deletion or repositioning of a station to comply with a Commission order may trigger complaints from those stations that must be repositioned or deleted. In addition, the cable operator needs 90 days to notify its billing company of notices that must be sent with the subscribers' monthly billing statements. For these reasons, TEL-COM proposes that the time period for implementing any such remedial order be at least 90 days.

III. RETRANSMISSION CONSENT

A. Definition of "Multichannel Video Programming Distributor"

The Act prohibits any cable system or other "multichannel video programming distributor"[15] from retransmitting the signal of a broadcast station without its express consent. This provision does not apply to (1) noncommercial broadcast stations, (2) home satellite

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[15] A multichannel video programming distributor is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." NPRM at ¶ 41; see 47 U.S.C. § 552(12).

reception of a non-network signal carried via satellite on May 1, 1991, (3) home satellite reception of a network signal to a noncable household, and (4) "superstations" carried via satellite on May 1, 1991.

The Commission notes that the definition of "multichannel video programming distributor" is broad in its coverage. NPRM at ¶ 42. The plain language of the definition includes the direct broadcast satellite service ("DBS"), and the multichannel multipoint distribution service ("MMDS"). The phrase "a television receive-only satellite program distributor, who makes available for purchase . . . multiple channels of video programming" refers to the master antenna television service ("MATV") and the satellite master antenna service ("SMATV") operator. "A satellite master antenna (SMATV) system receives radio signals transmitted by satellite to an earth station atop a multiple unit building and distributes the signals through an MATV system within the building." Definition of a Cable System, 5 FCC Rcd. 7638, 7639 (1990). Congress clearly intended that DBS, MMDS, MATV, and SMATV operators obtain the consent of any broadcast station whose signal the operator wishes to retransmit.

Congress set forth four specific exceptions to the retransmission consent requirement which do not include DBS, MMDS, MATV, and SMATV operators. Accordingly, Congress intended that these entities be subject to the retransmission consent provisions of the Act. Under the rules of statutory construction, if a statute specifies one exception to a general

rule, other exceptions or effects are excluded. See Andrus v. Glover Constr. Co., 446 U.S. 608 (1980). This rule is expressed in the doctrine "expressio unis est exclusio alterius" which means "the expression of one thing is the exclusion of another". Thus, the fact that Congress has not specifically exempted these types of multichannel video programming distribution methods where Congress has set forth specific exemptions demonstrates that DBS, MMDS, MATV, and SMATV operators may not retransmit a station's signal without its consent.

The rationale behind Congress' enactment of the retransmission consent requirement further demonstrates that the requirement is applicable to DBS, MMDS, MATV, and SMATV operators. The Conference Report states that "cable systems obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters." Conference Report No. 102-862 at p. 58. The purpose of the retransmission consent provision is to enable the broadcast station to determine the conditions by which its signal may be utilized. By enacting the provision, Congress has attempted to create a more equitable marketplace by which a broadcast station may bargain for the retransmission of its signal. This rationale applies equally to the retransmission of broadcast signal via DBS, MMDS, MATV, and SMATV.

TEL-COM asserts that the statutory language is unambiguous that multichannel video programming distributors include DBS, MMDS, MATV, and SMATV. TEL-COM, accordingly, suggests that the Commission explicitly set forth the entities which fall within the scope of the definition of multichannel video programming distributors in its final rules implementing the retransmission provision of the Act.

B. Scope of Retransmission Consent

The Act requires that by October 6, 1993, and every three years thereafter, broadcast stations are required to elect either must-carry rights or retransmission consent rights. The Act further provides that if there is "more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." The Commission interprets this provision to mean that "a station must make the same election for all directly competing cable systems, but that is could make different elections for cable systems that are in the same local television market but do not overlap." NPRM at ¶ 45. The Commission construes the term "geographic area" used in the Conference Report to refer to the television market rather than to the cable operator's franchise area. However, the Conference Report states that "[i]n situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems." This statement suggests that Congress was referring to the cable operator's service area. It is

reasonable to conclude that Congress understands that the operator's service area is defined by the franchise and, accordingly, the franchise area and not the service area is the relevant market to trigger the same election requirement.

TEL-COM proposes that the Commission clarify that the same election requirement is triggered when the franchise areas of competing cable systems overlap rather than when two cable systems are located within the same television market or when the systems' physical plants overlap.

C. Implementation Dates

Pursuant to the Act, after October 6, 1993, cable systems are prohibited from retransmitting the signal of a broadcast station without its consent unless that station has elected to assert its must-carry rights. The Commission has express concerned as to whether it must put the must-carry regulations into effect promptly upon the Commission's adoption of such regulations in this proceeding (i.e., approximately early April 1993). NPRM at ¶ 48. This would result in the must-carry regulations becoming effective well before the October 6, 1993, implementation date for retransmission consent. TEL-COM asserts that the Commission must provide the same effective date for both the must-carry and retransmission consent provisions. This is necessary for several reasons.

First, the cable operator must accommodate NCE and commercial stations asserting must-carry rights, broadcast stations granting retransmission consent, and any other broadcast

signals it desires to carry. If the must-carry provisions become effective before the deadline for retransmission consent, stations would be able to assert must-carry rights at any time from the effective date of the must-carry regulations until the date the retransmission consent election is required. This would require cable operators to add and delete stations from carriage as they choose to assert their must-carry rights. The cable operator would then be required to implement additions or deletions resulting from those stations electing to grant retransmission consent. As a result, cable operators would be required to reconfigure their systems several times, creating duplicative costs, delays, and frustration on the part of subscribers.

Secondly, if must-carry and retransmission consent elections are not made concurrently, the cable operator will be unable to assess how many channels are required for each use and which stations would have priority channel positioning rights. Furthermore, the operator will be unable to effectively negotiate retransmission consent agreements until it knows what programming will be available from the must-carry stations on its system. An operator should not be required to expend time negotiating for program material which that operator may nevertheless be required to carry. Similarly, an operator must be able to determine whether certain program material will only be available via retransmission consent in order for that operator to provide for backup alternative arrangements to obtain programming from other

sources so as not to completely deprive subscribers of access to certain programming.

As the Commission has noted, the copyright reporting period runs from January 1 to June 30 and from July 1 to December 31 each year. NPRM at ¶ 50. Cable operators are reluctant to add or delete stations during these periods since the full copyright liability is imposed regardless of whether a station is carried for the full period or during only part of that period. TEL-COM proposes that the Commission adopt an election date that becomes effective on either January 1 or July 1. Alternatively, the Commission should allow must-carry stations to schedule the commencement of their carriage on a system at the beginning of a copyright period if they so choose since the Act requires must-carry stations that are distant signals to indemnify the cable operator for copyright liability. With regard to those stations electing retransmission consent, compensation for copyright liability should be negotiated between the parties.

Finally, TEL-COM proposes that cable operators be given at least 90 days from the date of election to implement carriage of stations pursuant to must-carry or retransmission consent. There are several reasons for the necessity of a 90-day implementation period. First, the Act as well as many franchise agreements require operators to notify stations and subscribers at least 30 days in advance of any deletion or repositioning of a station. Second, cable operators will have to technically

reconfigure their systems. This reconfiguration may require service calls to the homes of subscribers to install or remove channel blocking equipment. In certain cases, additional equipment must be ordered and installed. Third, the operator's billing company must be notified in advance with regard to notifications to subscribers which must be sent with the subscriber's monthly bill. Finally, the Commission should take into account that operators are prohibited from deleting or repositioning stations during ratings sweep periods.

Accordingly, TEL-COM urges the Commission to make both the must-carry and retransmission consent provisions effective 30 days after a final order in this proceeding. Broadcast stations should be required to make their must-carry/retransmission consent election 30 days after the issuance of a final Report and Order in this proceeding. The Commission must also provide operators with at least 90 days from such election date to implement the stations' elections.

D. Broadcast Station Notification of Election

TEL-COM supports the Commission's proposal that each broadcast station place a notarized copy of its election statement in its public file. The broadcast station should also be required to supply the cable operator with a copy of its election as a prerequisite to obtaining mandatory carriage or negotiating a retransmission consent agreement. Due to the importance of documenting and adhering to its election, a station

not following this procedure should be treated as though it has made no election.

TEL-COM urges the Commission to address the implications of a station's failure to make an election either because the station did not follow proper Commission procedures for notification or because the station simply failed to take any action. If a station which has failed to indicate its election is already being carried on a cable system, the cable operator should be permitted to continue to carry the station at the operator's discretion, but without any must-carry rights. If the station is not already being carried by the operator, then the operator should be prohibited from carrying the signal. Moreover, if a station misses an election "window" it should be precluded from asserting either must-carry or retransmission consent rights until the time for election for the next three-year period. As the Commission recognizes, however, an exception must exist for new commercial television stations which go on the air during the three-year period between elections. The Commission has proposed that such new station's election take effect 60 days after it is made. TEL-COM asserts that this 60 day time period is insufficient to allow the cable operator to effectively notify other stations and subscribers of any deletion or repositioning necessary to accommodate the new station. Accordingly, TEL-COM proposes that operators be provided at least 90 days to implement the election of a new station.

E. Relationship Between Must-Carry and Retransmission Consent

In the NPRM, the Commission raises several issues with regard to the relationship between the must-carry and retransmission consent provisions of the Act. First, the Commission tentatively concludes that cable operators may use local retransmission consent channels to meet their signal carriage requirements under the Act. TEL-COM agrees with this interpretation. Second, with regard to the rights under the Act of must-carry stations concerning retransmittal of information contained in the vertical blanking interval ("VBI") and channel positioning, TEL-COM proposes that stations which choose retransmission consent over mandatory carriage are not entitled to these rights under the Act. Third, TEL-COM proposes that cable operators should not be required to carry the full program schedule of a retransmission consent station. This issue should be negotiated between the parties. In order to maintain programming flexibility, however, the carriage of a partial program schedule of a retransmission consent station should count as one channel toward the carriage requirement of the Act. Finally, retransmission consent stations should not be permitted to assert network nonduplication or syndicated exclusivity rights against other stations carried by the operator. The issue of exclusive program exhibition rights should be negotiated between the parties.

F. Retransmission Consent Contracts

1. Terms and Conditions

The rationale behind the retransmission consent provision of the Act is to "establish a marketplace for the disposition of the rights to retransmit broadcast signals." Senate Report on the Cable Television Consumer Protection Act of 1991 (S.12), S.Rept. No. 102-92 at p. 36. The Commission notes that "nothing prevents cable operators and television stations from negotiating retransmission consent contracts that contain provisions identical to those in Section 614 [of the Act]." TEL-COM agrees with the Commission's interpretation that although retransmission consent contracts may contain provisions which are identical to must-carry rights, such as channel positioning, syndicated exclusivity, and network nonduplication rights, these rights are negotiable and not mandatory for those stations granting retransmission consent. Of course, a negotiated retransmission consent agreement cannot conflict with any of the rights asserted by a must-carry station on the system. TEL-COM submits that the Commission must recognize some additional principles governing retransmission consent contracts.

First, the must-carry/retransmission consent election must run with the station. Broadcast stations should be precluded from changing their elections or the terms of any retransmission consent contract because of a change in the ownership of the station. Therefore, if a broadcast station or cable system changes ownership during the three-year election

cycle, the contract would be assigned to the new owner. The election and the terms of the retransmission consent contract are fixed for the three-year period. This would minimize unnecessary disruptions in a cable system's program schedule, a benefit in accordance with public policy.

Second, no retransmission consent agreement should permit exclusive carriage of a broadcast signal thereby precluding another cable system in the franchise area from obtaining access to that station's programming. This is consistent with the requirement that a broadcast station make the same election with respect to all cable systems or multichannel video providers in a franchise area. An exclusive carriage provision would go against the public interest as it would result in one system's subscribers being without any access to a particular station's programming. If a station elects to provide a signal to cable systems only upon its express retransmission consent, then that station should be obligated to negotiate in good faith with all cable systems in the franchise area for access to that station's programming.

2. Preemption of State Court Jurisdiction

With respect to the resolution of retransmission consent contract disputes, the Commission has tentatively determined that such disputes should be resolved in state court. NPRM at ¶ 57. TEL-COM strongly disagrees with the Commission's position. TEL-COM believes that the scope and comprehensive nature of the Act preempts all state action regulating cable

television systems and the relationship between cable operators and broadcast stations. State law causes of action regarding retransmission consent contracts are similarly preempted.

Federal preemption of state and local law exists where Congress has expressed its intent to occupy the field in a particular area or where an actual conflict between federal and state law exists. In Capital Cities Cable Inc. v. Crisp, the Supreme Court recognized that the FCC has preempted "all operational aspects of cable communications, including signal carriage and technical standards. 467 U.S. 691, 702 (1984). The Commission's exclusive jurisdiction also extends to cable carriage of "pay cable" services and the "regulation of importation of distant broadcast signals." Id. at 703, 704.

Where Congress has occupied a field, a state law cause of action to enforce legal or equitable rights that are equivalent to rights afforded under the federal law, are also preempted. Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F.Supp. 838, 849 (D.Mass. 1986)(Cable operator's state law claim of conversion was preempted by the Copyright Act). See also, Harrison Higgins, Inc. v. AT&T Communications, 697 F.Supp. 220 (E.D.Va. 1988)(breach of contract and negligence causes of action were preempted through Communications Act).

Various potential issues could arise under retransmission consent contracts, including issues with regard to channel positioning, information to be contained in the VBI, signal quality, program schedules, and the extent of syndex

and/or network nonduplication rights. These are issues which involve rights that are already within the scope of the Commission's regulations or the Act.

In addition, the retransmission consent provision of the Act is inextricably intertwined with the must-carry and rate regulation provisions. First, any negotiated terms contained in retransmission consent agreements may not conflict with the rights of a must-carry station. Second, the Act expressly preempts state and local regulation of its must-carry provisions, and vests the FCC with exclusive jurisdiction to resolve disputes concerning issues of mandatory carriage. Thus, any judicial review of a retransmission consent contract must consider the effect, if any, on mandatory carriage. Third, the FCC is directed by Congress to consider the impact retransmission consent will have on cable television rates. Therefore, issues regarding compensation under a retransmission consent contract must also take into account any federal regulations governing cable television rates.

Moreover, where the federal government has occupied the field and the federal statute or federal regulations promulgated thereunder fail to deal with a particular question, "the courts are to apply a uniform rule of federal common law." Harrison Higgins, supra, 697 F.2d at 224.[16] If the FCC chooses not to

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[16] The court in Higgins stated that "[t]he claims in the present case . . . involve breach of contract and negligence in the provision of interstate telecommunications services, but are not governed by the Communications Act. Higgins therefore has a cause of action under federal common law." Id. See also,

exert exclusive jurisdiction over the resolution of disputes concerning retransmission consent contracts, then federal courts - and not state courts - would have jurisdiction to resolve such issues.

Finally, the FCC is the agency which possesses the particular expertise to resolve such disputes. Delegating to federal courts the task of resolving disputes regarding issues that are within an agency's delegated authority and particular expertise would be an affront to the concepts of primary jurisdiction and judicial efficiency. Establishing exclusive jurisdiction in the Commission to resolve retransmission consent matters will establish a uniform body of case law as this new era in cable/broadcaster relationships evolves. Therefore, the FCC is the entity best suited to balancing the public policy goals of the Act with the interests of the parties.

G. Program Exhibition Rights and Retransmission Consent

The retransmission consent provision of the Act will be completely ineffective unless the Commission firmly establishes that the broadcast station has the right to grant unfettered consent to the retransmission of its signal, including the right to exhibit all of the programming contained in its signal. Congress' intent to "compensate the broadcaster for the value its

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Nordlicht v. New York Telephone Co., 799 F.2d 859, 862 (2d Cir. 1986)(claims against phone company for money and fraud were governed by federal common law); O'Brien v. Western Union, 113 F.2d 539 (1st Cir. 1940) (sending defamatory message covered by federal common law).

product creates for the cable operator" forms the basis for the broadcast station's right under the Act to grant to or withhold consent from a cable operator to retransmit the station's signal. See S. Rep. No. 92, 102d Cong., 1st sess. 35 (1991). The intent of the retransmission consent provision of the Act is to address the "distortion in the video marketplace" under which "broadcasters in effect subsidize the establishment of their chief competitors". Id. Congress created a clear distinction between the program distributor's rights in the program and the broadcaster's rights to grant retransmission consent of its signal. The Senate Report notes that "under the cable compulsory copyright license, . . . the owners of programming on distant signals carried on cable systems receive compensation for their copyright interests through the Copyright Royalty Tribunal. The copyright scheme, however, does not purport to - and in fact does not - provide compensation to broadcasters for their rights in the signals." Id. Clearly, in enacting the retransmission consent provision of the Act, Congress intended to compensate broadcasters for the value of their signals and not to provide additional compensation to copyright holders.

Accordingly, TEL-COM proposes that, consistent with Congressional intent, the Commission must prohibit program distributors from entering into or enforcing contracts which supersede any retransmission consent rights, including affiliation contracts between networks and local stations. In enacting the retransmission consent provision of the Act,

Congress intended to provide rights to local broadcast stations which would alleviate the imbalance in the local marketplace. Congress did not intend to further enrich the networks by enabling them to skim off a portion of the proceeds generally intended for the local broadcasters from retransmission agreements between the cable operator and the local station.

IV. CONCLUSION

As noted in the introduction to these comments, it is clear to TEL-COM that the must-carry and retransmission consent provisions of the Act are unconstitutional. TEL-COM understands that although the constitutionality of these provisions is currently being considered by the United States District Court for the District of Columbia, absent judicial intervention the Commission is required to proceed with implementation of the Act through its rulemaking process. Therefore, TEL-COM has submitted these comments which delineate the many important steps which the Commission should take in order to effect a smooth implementation of the Act. TEL-COM urges the Commission to consider the tremendous burdens placed on cable operators in connection with the implementation of the requirements of this Act and to recognize that such implementation will take a tremendous amount of time and effort to accomplish effectively. In particular, the Commission must recognize that negotiations for retransmission consent contracts in the newly created "marketplace" and the issues associated with these negotiations - such as channel positioning, syndicated exclusivity, and network nonduplication -